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Supreme Court, U.S.
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No. 03-1211

IN THE

Supreme Court of the United States

JOHN MACLACHLAN, *et al.*,

Petitioners,

v.

EXXONMOBIL CORPORATION, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The petition for writ of certiorari (the "Petition") does not present a question worthy of review by this Court.

Petitioners' first question is whether a plan administrator abuses his discretion in excluding coverage to employees, whose status as common law employees is uncontested, and who are not otherwise expressly excluded under the employer's ERISA governed plans. Petitioners' second and related question is whether a plan administrator abuses his discretion in interpreting undefined plan terms contrary to federal common law, or another statutory or regulatory standard. Even though Petitioners' framing of the questions is contrary to the relevant facts of this case, each of the three circuit courts that have addressed essentially these issues has held that a plan administrator vested with discretion to interpret a plan's terms may reasonably conclude that only employees issued a W-2 by the employer or paid on the employer's payroll are included as participants in a plan which provides benefits to "employees of an employer," and that there is no requirement that "employee" when used in an ERISA plan be interpreted to mean a common law employee as defined in *Nationwide Mutual Ins. Corp. v. Darden*, 503 U.S. 318 (1992). These decisions by the Ninth, Fifth and First Circuits are also consistent with the principles articulated by the Sixth and Seventh Circuits, and none of the cases cited by Petitioners as evidence of an inter-circuit conflict actually presents one.

Petitioners' third question is whether common law employees can be "discriminated against" as a class in a benefits plan governed under ERISA. This question has been definitively answered "Yes" by this court's precedent and

the precedent of the circuit courts that have addressed the issue. Petitioners have not presented any compelling justification for overturning these well-settled precedents.

In short, Petitioners have not presented a compelling reason for granting certiorari, as the Fifth Circuit's decision is not in conflict with any other circuit decisions or decisions of this court and the result of its decision is consistent with well-settled principles under ERISA.

A more appropriate phrasing of the question presented by the Petition is as follows: Where an individual has worked for an extended time providing services to a company while on the payroll of a third-party contractor, being paid by the third-party contractor, receiving benefits from the third-party contractor and with a clear understanding that the company would not be providing him benefits, will a plan administrator abuse its discretion in denying the individual benefits under an ERISA plan that provides benefits to "regular employees" of the company?

RULE 14.1(B) STATEMENT OF PARTIES TO THE PROCEEDING

Petitioners/Appellants/Plaintiffs

1. John MacLachlan
2. James Brown
3. Stephen K. Manley
4. Alaina Spurlock
5. Bernd Stahr
6. Michael Zaiontz
7. The case was brought as a class action, but no class has been certified

Respondents/Appellees/Defendants

1. ExxonMobil Corporation
2. Thomas C. Harrison
3. The Mobil Oil Corporation Retirement Plan
4. The Mobil Oil Corporation Comprehensive Medical Plan
5. The Mobil Oil Corporation Dental Assistance Provisions
6. The Mobil Oil Corporation Dependent Group Life Insurance Plan

7. The Mobil Oil Corporation Disability Income Plan

8. The Mobil Oil Corporation Employee Stock Ownership Plan

9. The Mobil Oil Corporation Employee Savings Plan

10. The Mobil Oil Corporation Life Insurance Plan

11. The Mobil Oil Corporation Pre-Social Security Plan

12. The Mobil Oil Corporation Termination Allowance Plan

13. The Mobil Oil Corporation Employee Severance Plan

14. The Mobil Oil Corporation Employee Separation Benefit Plan

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

ExxonMobil Corporation is a publicly traded company whose stock is listed on the New York Stock Exchange. ExxonMobil has no parent corporation, but has numerous subsidiaries which are not publicly traded. No publicly held company owns more than 10% of the stock of ExxonMobil Corporation.

TABLE OF CONTENTS

	Page
Questions Presented	i
Rule 14.1(B) Statement of Parties to the Proceeding	iii
Rule 29.6 Corporate Disclosure Statement	iv
Table of Contents	v
Table of Cited Authorities	vi
Statement of the Case	1
Petitioners' Statement of the Case is Inaccurate	1
Reasons for Denying the Writ	9
A. The Fifth Circuit's Decision is Consistent with the Decisions of Other Circuit Courts and Properly Applies Established Principles of ERISA	9
B. The Court Should Not Overturn the Well-Settled Rule that an ERISA Plan Need Not Cover all Common Law Employees of an Employer	12
Conclusion	18

TABLE OF CITED AUTHORITIES

Page

Cases:

Abraham v. Exxon Corp., 85 F.3d 1126 (5th Cir. 1996) 13

Admin. Comm. of the Sea Ray Employees' Stock Ownership & Profit Sharing Plan v. Robinson, 164 F.3d 981 (6th Cir. 1999), *cert. denied*, 528 U.S. 1114 (2000) 10

Allen v. W. Conference of Teamsters Pension Trust Fund, 788 F.2d 648 (9th Cir. 1986) 10

Averhart v. US West Mgmt. Pension Plan, 46 F.3d 1480 (10th Cir. 1994) 13

Bauer v. Summit Bancorp, 325 F.3d 155 (3d Cir. 2003) 13

Bronk v. Mountain States Tel. and Tel., Inc., 140 F.3d 1335 (10th Cir. 1998) 13

Capital Cities/ABC, Inc. v. Ratcliff, 141 F.3d 1405 (10th Cir. 1998), *cert. denied*, 525 U.S. 873 13

Fink v. Union Central Life Ins. Co., 94 F.3d 489 (8th Cir. 1996) 13

Firestone Tire and Rubber Co. v. Bruch, 489 U.S. 101 (1989) 14

Cited Authorities

Page

Hensley v. Northwest Permanente P.C. Ret. Plan & Trust, 258 F.3d 986 (9th Cir. 2001), *cert. denied*, 534 U.S. 1082 (2002) 9, 10, 11, 15

Kolling v. American Power Conversion Corp., 347 F.3d 11 (1st Cir. 2003) 9, 11

Lasser v. Reliance Standard Life Ins. Co., 344 F.3d 381 (3d Cir. 2003), *petition for cert. filed*, 72 U.S.L.W. 3553 (U.S. Feb. 19, 2004) (No. 03-1213) 11, 12

Lee v. E.I. du Pont de Nemours Co., 894 F.2d 755 (5th Cir. 1990) 16

Lockheed Corp. v. Spink, 517 U.S. 882 (1996) 12

MacLachlan v. ExxonMobil Corp., 350 F.3d 472 (5th Cir. 2003) ..... *passim*

McGrath v. Auto-Body North Shore, Inc., 7 F.3d 665 (7th Cir. 1993) 13

Nationwide Mutual Ins. Corp. v. Darden, 503 U.S. 318 (1992) ..... i, 9, 13, 14

Schikore v. BankAmerica Supplemental Retirement Plan, 269 F.3d 956 (9th Cir. 2001) 10, 11

Shaw v. Delta Airlines, Inc. 463 U.S. 85 (1983) ... 12

Cited Authorities

Page

Trombetta v. Cragin Fed. Bank for Sav. Employee Stock Ownership Plan, 102 F.3d 1435 (7th Cir. 1996) 10, 14

Vizcaino v. Microsoft, 97 F.3d 1187 (9th Cir. 1996), *rev'd in part and aff'd in part*, 120 F.3d 1006 (9th Cir. 1997) (en banc), *cert. denied*, 522 U.S. 1098 (1998) 15

Wolf v. Coca-Cola, 200 F.3d 1337 (11th Cir. 2000) 13

Statute:

29 U.S.C. § 1132(a)(1)(B) 9

STATEMENT OF THE CASE

Petitioners' Statement of the Case is Inaccurate

The Petitioners' statement of the case is inaccurate and incomplete. Respondents submit that the Fifth Circuit's opinion should be consulted as a more accurate and balanced discussion of the undisputed facts underlying this dispute. *See MacLachlan v. ExxonMobil Corp.*, 350 F.3d 472, 472-78 (5th Cir. 2003).

Clarifications of and supplements to the Petitioners' statement of the case include:

1. Respondents have not conceded that Petitioners were common law employees of Mobil. Solely for purposes of the motion for summary judgment granted below, Respondents agreed to assume that Petitioners were Mobil common law employees, because status as a common law employee was not determinative of benefits eligibility under the Mobil plans.

2. The contractors who employed Petitioners paid their wages, withheld employment and income taxes on their wages and provided their benefits. For example, Petitioner John MacLachlan was provided a 401(k) plan by Universal Technical Services (UTS) and was offered medical insurance (although he declined to participate). *See* 350 F.3d at 475.[1] MacLachlan also received vacation and holiday pay.

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1. Doc. 73, Ex. C-1 pp. 81-83. The District Court designated the exhibits to Respondents' Motion for Summary Judgment as Document 73 in their entirety, and references to these exhibits are (Cont'd)

3. During his employment with Consolidated Technical Services (CTS) and UTS from 1987 through 1999, MacLachlan knew that he was not considered an employee of Mobil for any purpose, that Mobil employees were receiving benefits that he did not receive and that Mobil did not intend to provide him benefits.[2] Furthermore, MacLachlan signed an agreement with CTS indicating that he was solely an employee of CTS and barring him from becoming an employee of Mobil within 30 days following his termination of employment with CTS.[3] Mobil also entered into contracts with CTS and the other contractor employers who hired Petitioners, and these contracts provided that Petitioners were to be

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made as "Doc. 73, Ex. _____." The specific circumstances of each of the other five Petitioners, including a description of the benefits provided by their employers, are summarized in Appendix A to Respondents' Memorandum in Support of Motion for Summary Judgment filed with the District Court. Doc. 73, Appendix A.

2. Doc. 73, Ex. C-1 pp. 105, 109, 113-114, 173-174, 179-180. Similarly, from the time they began to provide services to Mobil, all of the Petitioners were aware that they were not receiving Mobil benefits, and that they were entitled to receive benefits only through their payroll employers. Doc. 73, Ex. 8, Bates 196-214. Like MacLachlan, Petitioners Manley, Brown and Spurlock signed agreements with their third-party contractors acknowledging that they were not entitled to Mobil employee benefits. Doc. 73, Ex. 19. For example, Petitioner Stahr signed an employment agreement with his contractor providing that he was "not entitled . . . to any benefits under any employee benefit plan of Mobil corporation, its subsidiaries or affiliates presently have in effect or may put into effect in the future." Doc. 73, Ex. 30.

3. Doc. 73, Ex. 20; Ex. C-1 p. 57.

considered employees of the contractors. *See*, *e.g.*, 350 F.3d at 481.[4]

4. Nonetheless, in February 1999, MacLachlan's attorney sent a letter to Mobil requesting information about the eligibility requirements for Mobil's benefit plans. Thereafter, a series of written communications occurred between MacLachlan's attorney and Doug Davies, a Mobil benefits attorney. Davies provided plan excerpts at no cost and other information in response to MacLachlan's counsel's inquiries.[5] Shortly thereafter, MacLachlan's attorney filed a claim for benefits under the Mobil plans, which claim was referred to Thomas C. Harrison as the plan administrator of the Mobil plans.[6]

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4. The contract between CTS and Mobil provided that CTS employees such as MacLachlan would be "solely the servants and employees" of CTS. Doc. 73, Ex. C-1, p.136; Ex. 1 Bates 517-519.

5. Doc 73, Ex. 1, Bates 439-503. The undisputed facts contrast with Plaintiffs' assertion, without record citation, that MacLachlan "unsuccessfully attempted to engage meaningful dialogue with the administrator about his claim and to retrieve pertinent information, including copies of the plans themselves upon request" before filing his appeal. Petition, pp. 5-6.

6. Only John MacLachlan filed a claim for benefits pursuant to the ERISA claims procedures provided for under the Mobil plans. None of the other Petitioners filed a claim, asserting that the plan administrator's reasons for denying MacLachlan's claim would apply with equal force to them. The district court accepted this argument, concluding that the plan administrator's determination regarding MacLachlan applied with equal force to the other Petitioners. Doc. 73, Ex. 21, 24, 25, 29, 30.

5. Harrison did not fail to investigate the background of MacLachlan's claim. The Fifth Circuit concluded that "Harrison conducted a thorough investigation of the plan and the history of its administration," and gives an overview of the reasonable steps taken to reach his decision:

> Before the merger, Harrison was an Exxon employee and had not previously reviewed a claim for benefits under the Mobil plans. To make his decision, he reviewed the terms of the Mobil plans described above as well as MacLachlan's employment history with Mobil and CTS/UTS. Harrison also discussed the history of the plan's administration with Doug Davies, an ExxonMobil attorney who worked in Mobil's benefits division before the merger.
>
> Davies informed Harrison that there was no record of Mobil's paying benefits to similarly situated third-party contractors. Davies also stated his belief that MacLachlan was the first contractor to file a claim seeking benefits. Harrison's investigation revealed that Mobil historically had mailed information about benefits only to payroll employees. On the basis of this record, Harrison concluded that contractors such as MacLachlan are outside the plan's definition of "regular employees" and thus are ineligible for benefits.
>
> In March 2000, Harrison sent a letter to MacLachlan's attorney, formally denying benefits. Harrison explained that Mobil was denying MacLachlan's claims because MacLachlan had been employed by CTS/UTS and had not been on the Mobil payroll.

> Moreover, as Harrison stated, even if MacLachlan had been a common-law employee for tax purposes, "Mobil has consistently limited benefits to persons in a formal employment relationship with a participating employer-corporation."
>
> Harrison also made specific findings with respect to the different Mobil plans. MacLachlan was ineligible for the Retirement and Savings Plan, Harrison found, not only because MacLachlan was not on the payroll, but also because the terms of the plan exclude any person "retained by an employer-corporation under written contract on a consulting basis" or "employed by an employer corporation under a written contract where the terms of such written contract exclude participation in the Plan." Harrison concluded that a provision in MacLachlan's contract with CTS was intended to have this effect, because it stated that MacLachlan was "solely" an employee of CTS.
>
> Harrison also declared that MacLachlan was not entitled to participate in the Severance Plan, because that plan applied only to employees terminated on, or within two years after, the date on which a change in control of Mobil occurs. Here, the merger between Exxon and Mobil did not occur until after MacLachlan had been terminated. Accordingly, Harrison concluded, MacLachlan would have been unable to receive benefits under that plan, even if he had been a Mobil employee at the time of his termination.

350 F.3d at 477-78 (footnote omitted).

6. Harrison's decision to deny MacLachlan's claim is "amply supported by the record," 350 F.3d at 481, which included the following facts:

- MacLachlan's contract with CTS provided that he was solely the employee of CTS,[7]

- Mobil had a written agreement with CTS indicating that individuals providing services under the contract were exclusively the employees of CTS,

- Mobil had consistently construed its benefit plans to only apply to its payroll employees, as evidenced by who Mobil had actually provided benefits to in the past and the structure of its human resources administrative systems, which were not designed to provide benefits to nonpayroll employees,[8] and

- Mobil's administrative policies clearly set out that individuals not paid directly by Mobil were ineligible for benefits.[9]

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7. As the Fifth Circuit concluded, "[i]t is entirely reasonable for an administrator to conclude that a person who performs services for Mobil under such terms is not a "regular" employee of Mobil corporation." 350 F.3d at 481.

8. Doc. 73, Ex. 1, Bates 8009-015.

9. The Mobil employee classification policy provides under the heading of "NONEMPLOYEES": "[a] number of individuals who are not employees may perform services for employer-corporations or handle products of employer-corporations. Included are: . . . Consultants; and Employees of Contractors, Service Bureaus and

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7. The 1990 memoranda, which Petitioners attached as appendices D and E to the Petition, were written by the General Counsel of a Mobil operating subsidiary and are not interpretations of the Mobil plan documents.[10] Rather, these memoranda merely note that a plaintiff could assert entitlement to benefits, and do not indicate that such a claim would be proper in any way. As the Fifth Circuit stated in rejecting Petitioners' challenge to the District Court's reading of the memoranda:

> Even if plaintiffs had challenged the district court's weighing of the evidence, we would not have found the decision to be clearly erroneous, because the documents do not support the reading plaintiffs give them. The first memorandum, from F. K. Joiner of the Office of General Counsel, merely asserts one lawyer's "concern[] that *if* a Mobil independent contractor were deemed an employee for tax reasons, that the employee *would then seek* to obtain the other benefits of employment" (emphasis added). The second memorandum, from W. C. Whittemore of the same

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Outside Agencies." Under the heading "Employees of Contractors, Service Bureaus and Outside Agencies," the policy specifically provides that "individuals whose remuneration is not paid directly by Mobil Oil Corporation or its subsidiaries should not be considered employees of Mobil Oil Corporation or its subsidiaries." Doc. 73, Ex. 43, Bates 3548.

10. These memoranda were issued by the Office of General Counsel of Mobil Exploration & Production, U.S. ("MEPUS"), not the General Counsel of Mobil Oil Corporation, which is the reference made in the Mobil plans.

> office, similarly recognizes that independent contractors might one day seek to claim Mobil benefits, and suggests strategies to "reduce or eliminate your exposure." These documents by no means concede that the appellants were eligible for benefits.

350 F.3d at 480-81.

Furthermore, these memoranda were not evidence "obtained after the Administrative Record was closed and litigation initiated." Petition, p. 4. Instead, the undisputed testimony of Stephen Manley, one of the Petitioners, was that he was given copies of the memoranda by his supervisor while on a smoke break in 1990. R. 358, 623-25. However, petitioners declined to put these documents before the plan administrator, and Doug Davies testified that they had never seen the documents before his deposition. Doc. 73, Ex. 15, p. 139.

8. Despite Petitioners' repeated references to the Mobil General Counsel's interpretative authority, the Fifth Circuit noted that "[Petitioners] concede that the administrator has the discretion and final authority to determine eligibility for benefits and that the abuse of discretion standard applies." 350 F.3d at 479. The final decision in applying the plan language to the Petitioners' claim lies clearly within the ambit of the plan administrator.

9. Petitioners assert in the statement of the case that Harrison violated his fiduciary duties under ERISA. Petition, pp. 6-7. However, Petitioners fail to point out that the District Court dismissed Petitioners' fiduciary claims, and Petitioners did not appeal that dismissal.

Petition App. A, p. 2. This case solely involves a claim for plan benefits under section 502(a)(1)(B) of ERISA. 29 U.S.C. § 1132(a)(1)(B).

REASONS FOR DENYING THE WRIT

A. The Fifth Circuit's Decision is Consistent with the Decisions of Other Circuit Courts and Properly Applies Established Principles of ERISA

Petitioners are required to show a compelling reason for granting a writ of certiorari, but the Petition fails to do so. Despite the Petitioners' attempt to create a circuit split, there plainly is none. The only circuits that have directly addressed the issue in question have held exactly as the Fifth Circuit did: "employed by an employer" can reasonably be interpreted to be limited to include those employees who are paid on the employer's payroll and receive a W-2 from the employer, and not those who are paid by third-party leasing companies but who might subsequently be determined to be common law employees under the multifactor *Darden* test. *Hensley v. Northwest Permanente P.C. Ret. Plan & Trust*, 258 F.3d 986, 1000-02 (9th Cir. 2001), *cert. denied*, 534 U.S. 1082 (2002) (not unreasonable to apply "W-2 employee" definition of the phrase "employed by an employer"); *Kolling v. American Power Conversion Corp.*, 347 F.3d 11, 14 (1st Cir. 2003) ("Where, as here, the Plan adopts a circular definition of employee—'Employee of the Employer'—the Plan administrator has the discretion to reasonably determine the meaning of that phrase") and *MacLachlan*, 350 F.3d at 482 ("ERISA does not require Mobil to define its benefits plans in such a way as to provide coverage for all employees . . . To the contrary, it is well established that an employee

may be a common law employee for some purposes, yet not entitled to benefits under a benefit plan").[11]

Furthermore, these three cases are supported in their underlying analysis by decisions from other circuits. *See, e.g., Trombetta v. Cragin Fed. Bank for Sav. Employee Stock Ownership Plan*, 102 F.3d 1435, 1439 (7th Cir. 1996) ("Nothing in ERISA . . . compels a plan to use the term 'employee' in the same way it is used in the statute") (citation and internal quotation marks omitted); *Admin. Comm. of the Sea Ray Employees' Stock Ownership & Profit Sharing Plan v. Robinson*, 164 F.3d 981, 986 (6th Cir. 1999), *cert. denied*, 528 U.S. 1114 (2000) ("To limit an administrator's discretion to only those terms explicitly defined would undermine the administrator's discretionary power or require companies to write interminably long plans to account for every term").

The decision in *Schikore v. BankAmerica Supplemental Retirement Plan*, 269 F.3d 956 (9th Cir. 2001), cited by Petitioners as evidence of a circuit split, is inapposite and not in conflict with these decisions. In fact, *Schikore* was decided by the Ninth Circuit after *Hensley*, and was specifically reconciled with *Hensley*. *See* 269 F.3d at 962 n.3. The *Schikore* court held that the common law mailbox rule, which was at issue in that case, was a federal common law evidentiary rule that was appropriate to apply to ERISA plans absent language in the plan to the contrary. *Id.* In contrast, *Hensley*'s rationale was that plan administrators should be allowed to construe plan terms, whether defined or undefined, and the realm of possible definitions is not confined to the common law definition of those terms. *Id.*

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11. *See also Allen v. W. Conference of Teamsters Pension Trust Fund*, 788 F.2d 648, 650 (9th Cir. 1986) (upholding denial of benefits even though administrators applied a definition of a plan term that conflicted with its established statutory definition).

Petitioners argue that the *Schikore* panel did not need to distinguish *Hensley* on the grounds that *Hensley*'s holding regarding the reasonableness of a "W-2 employee" definition of "employee" was superfluous, since the plan administrator had made a finding in *Hensley* that the employees in question were not common law employees of the plan sponsor. However, this reading of *Hensley* is inconsistent with the language of the *Hensley* decision, which specifically holds that: "plan administrators should be given the full benefit of the discretion afforded to them by their respective plans in interpreting plan terms, be they defined or undefined, with the reasonableness of those interpretations being evaluated against the relevant factual and legal backgrounds." 258 F.3d at 1001. Petitioners' view is also directly at odds with that of the Ninth Circuit itself in its later characterization of *Hensley*, since in *Schikore* the *Hensley* holding was described as "our decision that a Plan Administrator need not apply a common-law definition of a Plan's term." 269 F.3d at 962 n.3 (citing *Hensley*).

Furthermore, even if *Hensley* and *Schikore* are deemed to be in tension, a writ of certiorari is not an appropriate remedy for an intra-circuit conflict.

Similarly, the Third Circuit's decision in *Lasser v. Reliance Standard Life Ins. Co.*, 344 F.3d 381 (3d Cir. 2003), *petition for cert. filed*, 72 U.S.L.W. 3553 (U.S. Feb. 19, 2004) (No. 03-1213), is not in conflict with *Hensley*, *MacLachlan* or *Kolling*. The *Lasser* court recognized that if a term is ambiguous, a reviewing court must defer to the plan administrator's interpretation. However, in the context of a disability policy, the court held that the term "regular occupation" was not ambiguous under the circumstances, and even if it was, the plan administrator's interpretation was not reasonable because it was contrary to all case law and

most other similar insurance policies. 344 F.3d at 385-87. In contrast, the interpretation by the Fifth Circuit in *MacLachlan* is consistent with all other case law addressing the meaning of the word "employee" or the phrase "employed by an employer" in an ERISA plan, and with the common understanding (and, it is undisputed, the Petitioners' understanding) of what the term "regular employee" meant to Mobil.

Petitioners also refer in their description of the standard of review to an alleged conflict of interest of Harrison on the grounds that he was an employee of ExxonMobil. Petition, pp. 9-10. Although Petitioners make no coherent argument regarding how this supports granting the writ for a review of the *MacLachlan* decision, Respondents would point to the Fifth Circuit's excellent and thorough discussion of this potential conflict and how, even assuming there was a conflict, the somewhat reduced deference afforded to the plan administrator's decision would not warrant its reversal. *See* 350 F.3d at 478-480. At best, Petitioners allege an incorrect application of a correct standard of law, which does not support a granting of the writ.

B. The Court Should Not Overturn the Well-Settled Rule that an ERISA Plan Need Not Cover all Common Law Employees of an Employer

Petitioners acknowledge that this Court has concluded that ERISA does not require that all common law employees be covered or treated equally in an employer's ERISA plans. *See Shaw v. Delta Airlines, Inc.* 463 U.S. 85, 91 (1983) ("ERISA does not mandate that employers provide any particular benefits, and does not itself proscribe discrimination in the provision of employee benefits"); *Lockheed Corp. v. Spink*, 517 U.S. 882, 887 (1996) ("Nothing

in ERISA requires employers to establish employee benefits plans. Nor does ERISA mandate what kind of benefits employers must provide if they choose to have such a plan").

Similarly, the circuit courts that have addressed the issue have repeatedly held in a number of contexts that not all common law employees need to be covered by an ERISA plan. *See, e.g., Abraham v. Exxon Corp.*, 85 F.3d 1126, 1130 (5th Cir. 1996) (eligibility exclusions based on factors other than age or length of service are permitted by ERISA); *Wolf v. Coca-Cola*, 200 F.3d 1337 (11th Cir. 2000) (same); *Averhart v. US West Mgmt. Pension Plan*, 46 F.3d 1480, 1486-88 (10th Cir. 1994) (permissible to design plan to exclude employees who were not "active employees on the payroll"); *Bronk v. Mountain States Tel. and Tel., Inc.*, 140 F.3d 1335, 1338 (10th Cir. 1998) (permissible to exclude leased telephone company workers); *Capital Cities/ABC, Inc. v. Ratcliff*, 141 F.3d 1405, 1410-12 (10th Cir. 1998), *cert. denied*, 525 U.S. 873, 119 S. Ct. 173 (permissible to exclude newspaper delivery boys); *McGrath v. Auto-Body North Shore, Inc.*, 7 F.3d 665 (7th Cir. 1993) (permissible to exclude employees by changing eligibility standards); *Fink v. Union Central Life Ins. Co.*, 94 F.3d 489, 491-92 (8th Cir. 1996) (permissible to exclude officer from receiving benefits under plan documents); *Bauer v. Summit Bancorp*, 325 F.3d 155, 165 (3d Cir. 2003) (permissible to limit coverage to salaried employees).

Furthermore, Petitioners have cited no authority for the proposition that all employees are included as ERISA plan participants unless specifically excluded, or that employees who meet the *Darden* common law employee test may not be excluded from participating in a plan.[12] The proper

12. Petitioners also assert that the Fifth Circuit's decision is in conflict with this court's ruling in *Darden*. This simply is not the (Cont'd)

analysis, consistent with this Court's decision in *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101 (1989), is that taken by the Fifth Circuit in responding to Petitioners' argument below that the lack of a specific exclusion for employees hired as third party contractors meant that such individuals must be included:

> To be sure, plaintiffs' reading of the Mobil plan is at least plausible in that before the 1994 amendment, the plan did not specifically exclude common law employees. But the plan does not explicitly include such employees, either. The remedy for such an ambiguity in a plan's language is not the compelled inclusion of all employees who arguably fit within its scope, but rather, the exercise of interpretive discretion by a duly empowered administrator. Harrison's decision that third-party contractors are not included in the plan was not an abuse of that discretion.

350 F.3d at 482.[13]

(Cont'd)
case. *Darden* addressed the meaning of "employee" for purposes of the ERISA statute itself, and nothing in this court's jurisprudence indicates that the term "employee" or "employed by an employer" must be given the same meaning in an ERISA plan. *See Trombetta*, 102 F.3d at 1439 ("Nothing in ERISA . . . compels a plan to use the term 'employee' in the same way it is used in the statute").

13. *See also* 350 F.3d at 477-78, 81, finding the plan administrator's conclusion "amply supported by the record" and based on a "thorough investigation of the plan and history of its administration."

Petitioners provide an extensive discussion of the decision in *Vizcaino v. Microsoft*, 97 F.3d 1187 (9th Cir. 1996), *rev'd in part and aff'd in part*, 120 F.3d 1006 (9th Cir. 1997) (en banc), *cert. denied*, 522 U.S. 1098 (1998), as support for their view of rights that should follow from common law status. However, *Vizcaino* did not require the inclusion of all common law employees in an ERISA plan (or require express exclusionary language). The en banc decision in *Vizcaino* required inclusion of the plaintiffs in the Microsoft Stock Purchase Plan, which was not an ERISA plan, but rather subject to regular rules of contract interpretation under state law. 120 F.3d at 1013-14. The ERISA plan claims were remanded to the plan administrator for consideration of the meaning of the plan's eligibility language, which, in critical part, read any "common law employee . . . who is on the United States payroll of the employer." *Id.* at 1010 (ellipsis in original). Furthermore, as the district court noted below, the *Vizcaino* decision involved individuals hired directly by Microsoft, not through third-party contractors. Petition, App. A at p. 13; 97 F.3d at 1189.[14]

Petitioners further misstate the question as being whether a plan administrator can "retroactively" exclude a common law employee from plan participation. But the concept of a "retroactive" exclusion assumes the individuals were at one time intended to be participants. Mobil consistently applied its plans to cover only employees actually on the payroll who received a W-2 from Mobil, and this was consistent with both parties' expectations. None of the Petitioners testified that he or she expected to receive benefits from Mobil, nor would it have been reasonable for them to expect such

14. In the end, to the extent there is any tension with *Hensley*, it is once again only an intra-circuit issue, and is not a circuit split worthy of correction via writ of certiorari.

benefits given the structure of Petitioners' relationship with Mobil. If any decision would have had "retroactive" effect, it would have been to include Petitioners in Mobil plans when there was never any intent to do so.

Petitioners attempt to paint discrimination against "common law employees" as an evil that ERISA is designed to prevent. Although not clear from the Petition, presumably the alleged evil is limited to individuals who are not classified as employees of the employer for whatever reason, but later are determined to be employees under the common law, 20-factor test.[15] To the contrary, a rule that would require plan coverage of individuals who were not considered by either party to the relationship to be employees, but who later are determined to be employees, would defeat an employer's reasonable expectations regarding obligations under its employee benefit plans and potentially jeopardize the health of the trusts which fund the plans. ERISA was designed to not only give employees assurance that promised benefits would in fact be provided, but also to encourage employers to provide benefits by assuring employers that only promised benefits would in fact have to be provided. *See, e.g., Lee v. E.I. du Pont de Nemours Co.*, 894 F.2d 755, 758 (5th Cir. 1990). Neither purpose would be served by Petitioners' proposed rule, which would present an untenable "catch-22" situation for employers without validating any reasonable expectation on the part of employees.

Adopting Petitioners' proposed rule would also upset long-settled expectations. As Petitioners note, "common law employment is usually only identified after a history of

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15. Obviously, the employees Mobil intended to and did, in fact, cover in its plans were also common law employees of Mobil.

behavior has been developed over an extended period of time." Petition, p. 28. Furthermore, because the standard for common law employment is "facts and circumstances" driven, it is often not obvious from the outset whether or not an individual meets the 20-factor test of common law employment. Thus, in a situation where the employer and the individuals have entered into a service relationship based on the expectation that no benefits would be provided, and both sides have worked under that understanding for many years, Petitioners are proposing that those expectations should be dramatically upset to avoid additional "discrimination" against common law employees. ERISA was not intended to allow the type of windfall that Petitioners suggest, and Petitioners' attempt to create a "suspect class" out of common law employees is in conflict with the policies underlying ERISA.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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